(7)

Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

M.C.C.No. 214 OF 2005

IN THE MATTER OF -

APPLICANT

M/S VIJETA CONSTRUCTION CO., a proprietorship firm owned and controlled by Shri Basant Bagade, aged about 45 years, son of Shri Nathuji Bagade, resident of opposite MLA Rest House, Tagore Nagar, Raipur C.G.

VERSUS

NON-APPLICANT

RAIPUR DEVELOPMENT AUTHORITY through -

(1) The Chairman, Raipur Development Authority, Near Bajrang Bhog Bhandar, Raipur C.G.

(2) The Chief Engineer, Raipur Development Authority, Near Bajrang Bhog Bhandar, Raipur C.G.

P.R. No. 2139/05
Presented by Shri Rakesh Sahu
dated 10.6.05

APPLICATION UNDER SECTION-11(6) OF ARBITRATION AND CONCILIATION ACT, 1996.

63

HIGH COURT OF CHHATTISGARH AT BILASPUR
M.C.C. No. 214/2005

M/s. Vijeta Construction Co.
Versus
Raipur Development Authority

M.C.C. No. 218/2005

M/s. Vijeta Construction Co.
Versus
Raipur Development Authority

M.C.C. No. 219/2005

M/s. Vijeta Construction Co.
Versus
Raipur Development Authority

Order post for 03-1-2007

Sd/-
Dhirendra Mishra
Judge

64

HIGH COURT OF CHHATTISGARH AT BILASPUR
M.C.C. No. 214/2005

M/s. Vijeta Construction Co.
Versus
Raipur Development Authority

M.C.C. No. 218/2005

M/s. Vijeta Construction Co.
Versus
Raipur Development Authority

M.C.C. No. 219/2005

M/s. Vijeta Construction Co.
Versus
Raipur Development Authority

Present: Shri V.R. Rao, Sr. Advocate with Shri A.K. Mishra, Adv. for the applicant.

Shri Ashish Shrivastava, Advocate for the respondents.

O R D E R

Per Dhirendra Mishra, J.

The above three applications under Section 11(6) of Arbitration and Conciliation Act, 1996 are being disposed of together by this common order as the dispute arising out of the contract agreements is between the same parties and common questions of law are involved for adjudication of these applications.

2. Contract agreements three in number were executed by the applicant with non-applicant authority for construction works of flats at Katora Talab, Raipur. Time allowed for completion of work was 24 months including rainy season. Time was to be reckoned from the date of issue of work order. Non-applicant Raipur Development Authority was merged with Raipur Municipal Corporation, Raipur with effect from 13-2-2001, however it was again restored back as autonomous body with effect from 26-10-2004. Though time allowed for completion of work was 24 months but it prolonged for 7 years for various latches and breaches of contract committed by the non-applicants. The applicant raised a

claim before the non-applicant in the year 2004. However, the claim preferred was not considered. The agreement contains Arbitration Clause 29 and accordingly the Superintending Engineer of the non-applicant was requested to enter upon the reference and settle the disputes, however, the above request was neglected. The applicant preferred appeal before the Commissioner of non-applicant, however the appellate authority also did not take any action on his appeal, ultimately the applicant requested vide its letter of Annexure A-7 for constitution of Arbitral Tribunal and the same was refused by the non-applicant authority vide Annexure A-8. Hence this application for appointment of a Arbitral Tribunal for settlement of the disputes arising out of the contract agreement has been filed.

3. The non-applicants authority in their identical replies to the above three applications admitted execution of the agreement which provides Arbitration Clause 29 for the purposes of settlement of disputes, however it was denied that the work contract prolonged for more than 7 years on account of latches and breaches of contract committed by the non-applicant, on the contrary it has been alleged that the delay occasioned on account of carelessness and failure on the part of the applicant company as they have failed to arrange labourers and the raw materials for construction work within time. It was submitted that for this reason the applicant company vide their communication dated 25-10-2004 had undertaken that they shall not claim anything in future for delay on their part. It has been further contended that the applicant Company vide letter dated 11th March, 2005 of Annexure R-4 which accompanied his own affidavit dated 10th March, 2005 of Annexure R-3 received full and final payment against final bill to his full satisfaction with a further declaration that henceforth the applicant Company shall not be making any claim against the non-applicant authority in relation to the above work. It has been further stated that as per the procedure prescribed in Clause 29 of the agreement, the appellate authority – Chairman of Raipur Development Authority was required to give his decision within 90 days from the date the appeal is preferred

and if any party is unsatisfied with the decision, he can refer such disputes for arbitration by an Arbitration Board to be constituted by the State Government consisting of three members. However in the instant case, no such request was made by the applicant Company to the State Government for constitution of the Arbitration Board and in view of the above, the instant application cannot be entertained as the same has been preferred without complying with the procedure prescribed in Clause 29 of the Agreement.

4. Learned counsel for the applicant submits that so far as the compliance under Clause 29 of the Agreement is concerned, the applicant Company vide document of Annexure A-7 addressed to the Chairman of the non-applicant had called upon the non-applicant to inform the name of their nominee as Arbitrator so that the Arbitrator appointed by the parties could select presiding officer, however this request was categorically declined vide Annexure A-8 and in the aforesaid circumstances, the applicant company had no other option except to file these applications for appointment of Arbitrator. With respect to the second submission of the non-applicant that the applicant Company has received payment against final bill after according full satisfaction and no claim is concerned, it is argued that the applicant Company was made to swear the affidavit under duress as he was in dire need of money and the non-applicants authority insisted that amount payable against security deposit and earnest money and other payments could be paid to the Company only when he accords full and final satisfaction and further issues no claim certificate. Reliance is placed on decisions in the matter of ***Tolani Fabricators –v- Rajasthan Urban Infrastructure Development Project, Jaipur*** reported in ***AIR 2006 Rajasthan 237*** and ***Ramsharan and Ramdayal Dau –v- Hindustan Steel Ltd.*** reported in ***1980 JLJ 689*** and it is contended that Arbitration Clause in a contract does not come to an end merely because performance of the contract has come to an end and the same still survives for adjudication of disputes arising under the agreement. Accord and satisfaction does not put an end to the arbitration

clause. The question "whether there has been a full and final settlement of the claim under the contract" is itself a dispute arising from or in relation to or in connection with the contract, which can be decided by the arbitrators.

5. On the other hand, learned counsel for the non-applicants submits that the applicant Company has preferred these applications without making a request to the State Government for constitution of the Arbitral Board under Clause 29 of the Agreement and as such the applications in the present form are premature. He further submits that while considering applications under Section 11(6) of the Arbitration and Conciliation Act, 1996, the designated judge has to decide regarding existence or other wise of a live claim between the parties and then only after appointment of arbitrator such live claim may be referred to him for arbitration.

6. I have heard learned counsel for the parties.

7. It is not in dispute that contract agreements entered between the parties consist of Arbitration Clause 29 which is reproduced as under:-

> **"Clause 29-** Except as otherwise provided in this contract all question and dispute relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned as to thing whatsoever in any way arising out of or relating to the contract designs, drawings specifications, estimate, concerning the works, or the execution or failing to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the Superintending Engineer in writing for his decision, within a period of 30 days of such occurrence. Thereupon the Chief Engineer shall give his written instructions and/or decisions within a period of 60 days of such request. This period can be extended by mutual consent of the parties.
>
> Upon receipt of written instructions or decisions the parties shall promptly without delay to comply such instructions or decisions. If the Chief Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested and if the parties are aggrieved against the decision of the Chief Engineer the parties may within 30 days prefer an appeal to

> the Chairman who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The Chiarman will give his decision within 90 days. If any party is not satisfied with the decision of the Chairman, he can refer such disputes for arbitration by an Arbitration Board to be constituted by the State Government, which shall consist of three members of whom one shall be chosen from among the officers belonging to the department not below the rank of S.E. one retired Chief Engineer of any technical department, and on serving officer not below the rank of S.E. belonging to another technical department."

8. From perusal of this clause, it is evident that all disputes whether arising during progress of the work or after completion or abandonment thereof are required to be referred to the Chief Engineer in writing for his decision within a period of 30 days of such occurrence. The Chief Engineer is to give his written instructions/decision within a period of 60 days of such request. This may be extended by mutual consent of the parties. If the Chief Engineer fails to give his decision within a period of 60 days or within such mutually agreed time after being requested, the parties may within 30 days prefer appeal to the Chairman who shall decide the appeal after affording opportunity to the parties. The Chairman is to give his decision within 90 days. Unsatisfied party with the decision of the Chairman can refer such dispute for arbitration by an Arbitration Board to be constituted by the State Government which shall consist of 3 members. In all these three cases, the applicant Company has preferred an appeal under Clause 29 of the Agreement before the Commissioner vide their letter dated 20-3-2005. A request has been made to the Chairman of the non-applicant for appointment of their nominee to the Arbitration Board so that the nominees of both the parties may select presiding officer and arbitral proceedings may commence. Admittedly no request to the State Government as per the procedure prescribed in Clause 29 of the agreement for constitution of Arbitration Board has been made and the instant applications have been filed solely on the ground that their request for appointment of Arbitrator has been declined by the non-applicants vide letter dated 12-7-2005 of Annexure A-8. From perusal of Annexure A-8, it is evident that the request has been

declined by the non-applicant authority on the ground that the above request was contrary to Clause 29 of the agreement dated 31-12-1996.

9. So far as according satisfaction vide Annexures R-3 and R-4 is concerned, from perusal of Annexures R-3 and R-4, it is found that the applicant has received payment against final bill after according full and final satisfaction. The applicant has also given categorical undertaking that no claim subsists against the non-applicants authority with respect to the contracted work. Though learned counsel for the applicant has vehemently argued that the applicant was made to swear the affidavit under duress as he was in dire need of the money which was outstanding for a long time with the non-applicants authority, therefore, according satisfaction shall not put an end to the arbitration clause and this question whether there has been full and final settlement of the claim under contract, can be decided by the Arbitrator.

10. In the matters of ***Ramsharan and Ramdayal Dau Co.*** (supra), the Division Bench of High Court of Madhya Pradesh has held that the Arbitration Clause in the original contract between the parties was not put to an end by the plea of payment in full and final settlement raised by the Company which was disputed by the contractors. The plea that contractors' accepted the payment in satisfaction of all claims in connection with the contract except as to security deposit means that the contract was discharged except as to security amount by performance in the shape of payment made to the contractor's satisfaction. The plea does not raise any case of substitution of the original contract by another contract. The plea in its true character is not a plea of novation but only of accord and satisfaction. The question whether this plea was tenable or, in other words, whether there was in fact payment in full and final settlement binding on the contractors was a matter which under the authority of the decision in K.K. Kar's case had to be decided by the arbitrators, being a question arising from or in relation to or in connection with the contract.

11. In the matter of ***Tolani Fabricators*** (supra), Rajasthan High Court has also expressed similar view that application for reference to Arbitrator is maintainable even after full and final settlement of the claim and it has been held that it is for the Arbitrator to resolve as to whether any amount is due to be paid and how far claim is tenable.

12. However, in these matters the applicant Company has received payment against final bill including payment against security deposit and earnest money after according full and final satisfaction. The applicant has nowhere mentioned in its application that above money was received by the applicant under duress. The fact of receiving payment against final bill has not been even mentioned in the applications for appointment of Arbitrator under Section 11(6) of the Act. The non-applicants have mentioned this fact in their reply. The applicant even after reply was filed by the non-applicants has not filed any rejoinder bringing on record the alleged circumstances under which the applicant Company was forced to receive the payment against final bill after according full and final satisfaction.

13. A seven Judges' bench of Supreme Court in the matter of ***SBP & Company –v- Patel Engineering Ltd.*** reported in ***(2005) 8 SCC 618*** in para 39 of the judgment has observed as under:-

> "39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be

appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

Relevant portion of paragraph 47 of the above judgment, in which conclusions have been summed up is under:-

"47. We therefore, sum up our conclusions as follows:-

(i) ... ...
(ii) ... ...
(iii) ... ...
(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge."

Thus from perusal of the above decision, it is in the jurisdiction of the designated Judge to decide preliminary aspects such as existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators.

14. In the light of the above judgment, the designated Judge considering an application under Section 11 of the Act has to decide-

(i) his own jurisdiction;

(ii) whether there is an arbitration agreement defined in the Act;

(iii) whether the applicant is a party to such agreement;

(iv) whether the claim was a dead one or a long-barred that was sought to be resurrected; and

(v) whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.

The above decisions can be made either on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary.

15. In the instant cases, an affidavit dated 10th March, 2005 of Annexure R-3 has been has been filed by the non-applicant authority stating therein that the applicant Company have received final bill for the above work including security deposit and earnest money with full satisfaction and no further claim subsists against the above work. The non-applicant authority has also submitted the application of the applicant dated 11th March 2005 of Annexure R-4. These applications under Section 11 of the Act have been filed on 30th September, 2005, however, the above fact has not been mentioned.

16. Thus from the material available on record, if we apply the above law enunciated by the Apex Court in the present set of facts, we find that the applicant Company has preferred this application without approaching appropriate authority with a request to constitute Arbitration Board as per Clause 29 of the agreement. It is also found that the applicant had received payment against final bill after according full and final satisfaction and as such no live claim arising out of the contract agreement exists between the party which may be referred to the arbitrator.

17. In the result, the instant applications i.e. M.C.C. No. 214/2005 (M/s. Vijeta Construction Co. –v- Raipur Development

Authority), M.C.C. No. 218/2005 (M/s. Vijeta Construction Co. –v- Raipur Development Authority) and M.C.C. No. 219/2005 (M/s. Vijeta Construction Co. –v- Raipur Development Authority) are rejected. However there shall be no order as to costs.

18. A copy of this order be placed in the records of all the three cases.

Sd/-
Dhirendra Mishra
Judge